

COURT OF APPEALS,
DISTRICT OF COLUMBIA.

FILED

DEC 5 - 1900

Robert Wilby
CLERK.

Court of Appeals of the District of Columbia

OCTOBER TERM, 1900.

No. 1005.

JOSEPH W. STERN AND EDWARD B. MARKS,
APPELLANTS,

vs.

GEORGE ROSEY.

BRIEF OF APPELLEE.

D. W. BAKER,

H. M. EARLE,

Solicitors for Appellee.

IN THE
Court of Appeals of the District of Columbia

OCTOBER TERM, 1900.

No. 1005.

JOSEPH W. STERN ET AL., APPELLANTS,

vs.

GEORGE ROSEY, APPELLEE.

STATEMENT OF CASE.

The bill of complaint recites that the complainants are engaged in the business of publishers of music and as co-partners are the sole owners of two certain musical compositions and vocal selections entitled "Take Back Your Gold" and "Whisper Your Mother's Name;" that they have complied with all of the requirements of the several acts of Congress in regard to the copyright law, and that said musical compositions and selections show that said statutes have been complied with, and that complainants are the only persons entitled to publish and sell the said musical compositions and songs.

That the defendant, George Rosey, is the manufacturer and maker of certain wax cylinders for a mechanical instrument or device known as the "phonograph," and that he, having knowledge of complainants' ownership, and in violation thereof, prepared and manufactured certain wax cylinders,

which were placed in the mechanical device known as the "phonograph," and that said cylinders, while in the course of being revolved, were sung into through a metal horn or megaphone, and the words and music of said copyrighted musical compositions were engraved on said wax cylinder by means of a sapphire recording point, whereby the said copyrighted musical compositions and songs were reproduced and published, and the defendant has been selling large numbers of the aforesaid wax cylinders with engraved records of said words and music of said copyrighted songs.

The bill then alleges the extent of the injury and asks for an injunction and accounting.

On May 22, 1900, the bill was amended by adding thereto paragraph five and a half, which paragraph describes what is known as a master record and shows the manner of reproducing any number of these records.

Neither the bill nor the amendment to the bill sets up or alleges that the perforations or indentations on the wax cylinders are copies of the several songs nor is there any allegation that the matter indented or perforated by the sapphire recording point in any way resembles the music and words of the several songs; all that is said is this:

"That said defendant, having knowledge of your complainants' ownership of the aforesaid two musical compositions and songs and in violation of your complainants' said rights, prepared and manufactured certain wax cylinders which were placed in the mechanical device known as the 'phonograph' which caused said cylinders to be revolved; that while in the course of being revolved under a certain metal horn or 'megaphone' in which words and music of said copyrighted musical compositions and songs were sung by the human voice, and the sound which was transmitted through said metal horn or to what is known as a sapphire recording point having sharp even surface, and while the said words and musical compositions and songs were being sung into said metal horn or megaphone the said cylinder

was revolved and the said words and music of said copyrighted musical compositions and songs were engraved on said wax cylinders by means of said sapphire recording point for the purpose of reproducing and publishing the said copyrighted compositions and songs."

To this bill defendant filed a demurrer on the ground that complainants did not state in their said bill a case that entitled them to any relief, and that the bill did not show any infringement of the said copyrighted productions therein stated or any publication of the same by the defendant within the meaning of the copyright laws of the United States.

On April 22, 1900, the demurrer to the bill as amended was sustained and the bill dismissed and an appeal taken to this court.

ARGUMENT.

The only question involved in this case is whether or not the mechanism which produces a song with the tune as sung by a person is an infringement of the copyright laws of the United States, the song being reproduced by means of the use of a wax cylinder placed in the "phonograph," which wax cylinder has indentations thereon caused by a certain mechanical device operated by means of mechanism and the human voice, and whether or not the indentations on the wax cylinder are a copy of said copyrighted musical productions and songs.

Whether or not the complainants have a common law property in "Take Back Your Gold" and "Whisper your Mother's Name," is a good deal like "The Flowers that Bloom in the Spring," it has nothing to do with this case.

No contention was made in the court below as to the

existence or non-existence of this common law right. Appellee did contend that it was absolutely immaterial whether or not at common law the complainants would have such right, because the only question involved in this case was whether or not they had a right under the copyright laws of the United States, these laws having superseded the common law, and in this contention appellee is supported by the best authority. In the case of *Holmes vs. Hurst*, 174 U. S., p. 82, the Supreme Court of the United States, speaking on this question, say:

"The right of an author, irrespective of statute, to his own productions and to a control of their publication, seems to have been recognized by the common law, but to have been so ill-defined that from an early period legislation was adopted to regulate and limit such right. The earliest recognition of this common law right is to be found in the charter of the Stationers' Company, and certain decrees of the Star Chamber promulgated in 1556, 1585, 1623 and 1637, providing for licensing and regulating the manner of printing, and the number of presses throughout the Kingdom, and prohibiting the publication of unlicensed books. Indeed, the Star Chamber seems to have exercised the power of search, confiscation, and imprisonment, without interruption from Parliament, up to its abolition in 1641. From this time the law seems to have been in an unsettled state—although Parliament made some efforts to restrain the licentiousness of the press—until the eighth year of Queen Anne, when the first copyright act was passed, giving authors a monopoly of the publication of their works for a period of from fourteen to twenty-eight years. Notwithstanding this act, however, the chancery court continued to hold that, by the common law and independently of legislation, there was a property of unlimited duration in printed books. This principle was affirmed as late as 1769 by the Court of King's Bench in the very carefully considered case of *Miller vs. Taylor*, 4 Burr, 2303,

in which the right of the author of 'Thompson's Seasons' to a monopoly of this work was asserted and sustained. But a few years thereafter the House of Lords, upon an equal division of the judges, declared that the common law right had been taken away by the statute of Anne, and that authors were limited in their monopoly by that act. *Donaldson vs. Becket*, 4 Burr, 2408. This remains the law of England to the present day. An act similar in its provisions to the statute of Anne was enacted by Congress in 1790, and the construction put upon the latter in *Donaldson vs. Becket* was followed by this court in *Wheaton vs. Peters*, 8 Pet. 591 (8: 1055). While the propriety of these decisions has been the subject of a good deal of controversy among legal writers, it seems now to be considered the settled law of this country and England that the right of an author to a monopoly of his publications is measured and determined by the copyright act; in other words, that while a right did exist by common law, it has been superseded by statute."

This being so, we now come to consider whether or not the action of the defendant was an infringement of any of the rights given complainants by the several acts of Congress. According to the statutes, a person shall have a right to copyright certain productions among other musical compositions, and shall be entitled to the exclusive property therein for a certain limited time, and if, after complying with the act, any person shall engrave, etch, copy, print, publish, translate or import, either in whole or in part, or by varying the main design with intent to evade the law, any map, chart, musical composition, print, cut, engraving or photograph or chromo, or of the description of any painting, drawing, statue, statuary, model or design intended to be perfected and executed as a work of fine art, or, knowing the same to be so printed, published, translated or imported, shall sell or expose for sale any copy of any such map or other articles aforesaid, he shall forfeit to the proprietor all

of the plates on which the same shall be copied and every sheet thereof.

Appellants do not attempt to show under which part of the statute they wish to hold defendant. They use the word "engrave" in their bill, but in describing the manner in which the infringement is done, and stating the substance on which it is done, they show conclusively that the action of the defendant does not come within the word "engrave," as used in the statutes. To engrave means to cut or carve in sunken patterns, incise with letters or figures or with lines representing any object, applied especially to work on metal, but also to work on stone and other hard substances.

Further, complainants do not bring the action of the defendant within the word "etch" mentioned in the statute. Etch signifies to cut or bite with an acid or mordant; specifically to engrave by the use of a mordant, as to etch a design on a copper plate; applied in the fine arts either to a design or to the plate upon which it is made.

There are no other words in the statute under which the action of the defendant could be included unless it be the words "copy," "print," "publish," all of which words have a meaning given to them which meaning shows conclusively that they could not be construed to include the action of defendant. Copy means to imitate; print, to stamp by direct pressure, as from the face of types, plates, or blocks, covered with ink or pigment; publish means to cause to be printed and offered for sale, issued from the press, put in circulation, as to publish a book.

When we come to the latter part of the statute, which speaks of punishing anyone who "shall sell or expose for sale any copy of any such map, or other article aforesaid," the fallacy of complainants' contention is apparent, for defendant has no copy nor has he made any copy of the songs in question. A copy is defined to be a duplication, a trans-

cription, imitation of something, and when the act says that there shall be a forfeiture of all the plates on which the same shall be copied, it shows conclusively that it means a forfeiture of something that is a copy or has resemblance to the matter copyrighted, and that matter is engraved, etc., on a sheet of some kind.

We might stop here without further argument, but the law on this question has been fully settled both in this country and in England. Since 1888 it has been decided in this country that perforated paper, made so for the purpose of the reproduction of sound, is not an infringement of the composition produced, and this decision has been acquiesced in and never been attacked. In the case of *Kennedy et al. vs. McTamany*, 33 Fed. Rep., p. 584, the Federal Court, in considering whether or not certain perforated sheets of paper were an infringement of a certain copyrighted song entitled "Cradle's Empty, Baby's Gone," held that such action was not an infringement. The court among other things said that to the ordinary mind it would be a difficult thing to consider these perforated slips of paper as sheet music. In them there were no clefs, bars, lines or spaces or other marks which are found in common printed music, but only plain strips of paper with rows of holes or perforations. Here in this case we have nothing but a cylinder indented by means of certain mechanical appliances assisted by the human voice. Again, the Federal judge deciding the above quoted case, says:

"I can not convince myself that these perforated strips of paper are copies of sheet music within the meaning of the copyright law. They are not made to be addressed to the eye as sheet music but they are a part of a machine. They are not designed to be used for such purposes as sheet music nor do they in any sense occupy the same field. They are a mechanical invention made for the sole purpose of performing tunes mechanically upon a musical instrument."

And so is the cylinder here in question. The marks upon it do not resemble sheet music, nor do they in any sense occupy the same field. The cylinder itself is a mere mechanical invention, made for the sole purpose of reproducing the human voice by means of a phonograph, a part of which instrument the cylinder itself is. This cylinder is more akin to the barrel of a hand organ or that of the music box than the perforated sheets of paper.

It was contended that these perforated sheets of paper might be read, but the answer to that was that while certain persons might, by study and practice, read music from them, yet as a practical question in the musical profession, or in the sale of music, they could not be recognized as sheet music, and that in no fair or proper sense could they be considered copies.

In the case of *Boosey vs. Wright*, 1st Chancery, L. R. 1899, p. 836, the English court considered this same question, and, while not citing the *McTamany* case, they come to exactly the same conclusion. In this case the defendant sold, for use in a mechanical wind instrument called an "aeolian," perforated rolls of paper, which represented instrumental music of certain songs which plaintiff had copyrighted, the songs being "My Lady's Bower," "The Better Land," and "The Holy City." The rolls were inserted in the instrument and unrolled by its action, and the passage of air through the slots in the rolls into the pipes of the instrument produced musical sounds, the pitch and duration of which were determined by the position and length of the slots. The instrument also contained stops, swells and pedals, whereby variations of time and expression could be effected at the will of the performer, and in the margin of some of the rolls there appeared directions as to time and expression, which also could be found in plaintiff's song. The court held that the paper rolls, so far as they contained the perforations, were merely a part of the instrument, and

not sheet music within the meaning of the copyright act of 1842, but further held that the directions as to time and expression which could be read by any person were an infringement of plaintiff's copyright. Speaking of these rolls, the court said :

“The rolls, so far as they contain perforations, are, in fact, used simply as parts of a machine for the production of musical sounds, not for the purpose of a book. They are used as a means of appealing to the mind directly through the ear, not as in the case of a book through the eye of an ordinary reader, or through the sense of touch in the case of a blind person. Some mechanical instruments for the production of musical effect, as, for example, a music box and the barrel organ, seem to have been known in the last century long prior to the passage of the act of 1842. It was admitted by Mr. Scrutton, in his able argument for the plaintiff, that if the construction sought to be placed by them on the act be sound, the cylinder of a music box is a sheet of music within the meaning of the statute. If this had been within the contemplation of the legislature, I can not but think the framers of the act, who were careful to point out what the word book was to mean and include, would have been no less careful to explain what the term sheet of music was to mean and include, and that it was not to include something which would not fall within the general acceptation of the word.”

The reasoning of the court in the English case is apropos to the contention of appellee under the act of Congress. If the indentations on the cylinder cause an infringement of appellant's copyright, then every mechanical invention, whether it be cylinder, perforated sheets or the barrel organ, is an infringement under the act, notwithstanding the fact that some of these mechanical inventions were known at the time of the passage of the act and are not by the terms of the act included therein.

In conclusion, of appellants' case we desire to say exactly what was said by the Federal judge in the McTamany case: There are no decided cases which directly or by analogy support the position of the complainants; and that it seems, both upon reason and authority, they have failed to show an infringement of their copyright; and that, therefore, the court below was right in dismissing the bill, and such action on the part of the court should be affirmed.

D. W. BAKER,

H. M. EARLE,

Solicitors for Appellee.

TRANSCRIPT OF RECORD.

Court of Appeals, District of Columbia

OCTOBER TERM, 1900.

No. 1005.

JOSEPH W. STERN AND EDWARD B. MARKS,
APPELLANTS,

vs.

GEORGE ROSEY.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

FILED JUNE 27, 1900.

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

OCTOBER TERM, 1900.

No. 1005.

JOSEPH W. STERN AND EDWARD B. MARKS,
APPELLANTS,

vs.

GEORGE ROSEY.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

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in the Court of Appeals of the District of Columbia.

JOSEPH W. STERN and EDWARD B. MARKS, Appellants, }
vs. } No. 1005.
GEORGE ROSEY.

Supreme Court of the District of Columbia.

JOSEPH W. STERN ET AL. }
vs. } No. 21365. In Equity.
GEORGE ROSEY.

UNITED STATES OF AMERICA, } ss :
District of Columbia,

Be it remembered that in the supreme court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

1 *Bill of Complaint.*

Filed Apr. 23, 1900.

In the Supreme Court of the District of Columbia.

JOSEPH W. STERN and EDWARD B. MARKS, }
Complainants, } In Equity. No. 21365.
vs. }
GEORGE ROSEY, Defendant.

To the honorable the justices of the supreme court of the District of Columbia, holding a special term in equity:

Your complainants, Joseph W. Stern and Edward B. Marks, respectfully represent:

1. That they are citizens of the United States and residents of the city of New York, and copartners trading under the name and style of Joseph W. Stern and Company.

2. That the defendant, George Rosey, is a citizen of the United States and a resident of the city of New York, but temporarily residing in the District of Columbia, and is sued as hereinafter mentioned.

3. That your complainants, as copartners, are engaged in the business of publishers of music, and as copartners are the sole owners of two certain musical compositions and vocal selections

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entitled as follows: "Take Back Your Gold" and "Whisper Your Mother's Name;" that being sole owners and proprietors of said musical compositions and songs, on or about the 8th day of August, 1896, and on the 20th day of February, 1897, they complied with the requirements of sections 4948 to 4970, both inclusive, of the Revised Statutes of the United States, as amended, being what is known as the copyright law, to wit, filed two printed copies of each of the said musical compositions and songs at the office of the Librarian of Congress at Washington, in the District of Columbia. The said musical compositions and songs were recorded by the Librarian of Congress in a book kept by him for that purpose. Certified copies of said records or copyrights are hereto attached, marked Complainants' Exhibits A and B, and made a part of this bill the same as if the contents thereof had been fully set forth.

4. That your complainants have been publishing and selling the said musical compositions and songs entitled "Take Back Your Gold" and "Whisper Your Mother's Name," and upon each and every copy thereof published and sold by your complainants there appeared upon the title-page or front sheet of the same the following words, viz: "Copyright 1896 by Jos. W. Stern & Co. All rights reserved," and also "Copyright 1897 by Jos. W. Stern & Co. All rights reserved," as provided by section 4962 of the Revised Statutes of the United States. Copies of said songs are hereto attached, marked Complainants' Exhibits C & D; that your complainants are the only ones entitled to publish and sell the said musical compositions and songs and are sole owners of all rights in any way connected therewith.

5. That the defendant, George Rosey, is engaged in the business and trading under the name and style of "The Universal Record Company," and is the manufacturer and maker of wax cylinders for a mechanical instrument or device known as the "phonograph;" that the said defendant, having knowledge of your complainant's ownership of the aforesaid two musical compositions and songs, and in violation of your complainant's said rights, prepared and manufactured certain wax cylinders which were placed in the mechanical device known as the "phonograph," which caused the said cylinders to be revolved; that while in the course of being revolved under a certain metal horn or megaphone, in which words and music of the said copyrighted musical compositions and songs were sung by the human voice and the sound which was transmitted through the said metal horn or megaphone to what is known as a sapphire recording point, having sharp, even surface, and while the said words and musical compositions and songs were being sung into the said metal horn or megaphone, the said cylinder was revolved and the words and music of the said copyrighted musical compositions and songs were engraved on said wax cylinders by means of said sapphire recording point for the purpose of reproducing and publishing the said copyrighted musical compositions and songs, and in violation of the rights of your

complainants the defendant has been selling large numbers of the aforesaid wax cylinders with the engraved records of the words and music of the said copyrighted musical compositions and songs; and your complainants further state that they are informed, and being informed verily believe the same to be true, that the defendant is now producing and selling large quantities of the aforesaid wax cylinders with the words and music of the said two musical compositions and songs engraved upon the same, notwithstanding the demand made upon him by your complainants that he cease from so doing.

4 6. That said defendant has produced large numbers of said copies, as set out in foregoing paragraphs, and has not accounted to your complainants, and your complainants are entitled to an accounting for the profits derived from said publication (said profits your complainants are informed and believe amount to the sum of ten thousand dollars), and to an injunction restraining defendant from using any more of said copies, complainants hereby waiving all rights they may have to the penalties and forfeitures which they may be entitled to under the statutes of the United States as in such cases made and provided.

Wherefore, the premises considered, your complainants pray:

1. That the United States writ of subpoena issue out of this honorable court, directed to the defendant, George Rosey, commanding him on a day therein named to enter his appearance and answer the exigencies of this bill.

2. That the defendant, George Rosey, discover and make known to your complainants the number of wax cylinders made by him upon which he has by means of the mechanical device known as the phonograph engraved and recorded the copyrighted musical compositions and songs entitled "Take Back Your Gold," "Whisper Your Mother's Name," and that he further discover and make — the names of all persons to whom he has sold said wax cylinders with the record of said copyrighted musical compositions and songs engraved and recorded thereon; that the defendant, George Rosey, be compelled to account to the complainants for the number of cylinders so engraved and sold by him.

5 4. That a preliminary injunction (to be made final at the hearing in the cause) be issued enjoining the defendant from making or selling said wax cylinders upon which he has by means of the mechanical device known as the phonograph engraved and recorded the copyrighted musical compositions and songs entitled "Take Back Your Gold" and "Whisper Your Mother's Name."

5. That your complainants may have such other and further relief as from the premises may appear to the court to be equitable and just.

JOS. W. STERN.
EDWARD B. MARKS.

JOSEPH W. STERN ET AL. VS. GEORGE ROSEY.

CITY OF NEW YORK,
County of New York, } ss:

Joseph W. Stern and Edward B. Marks, being first duly sworn, depose and say that they have read over the foregoing bill by them subscribed and know the contents thereof; that the matters and things therein stated as of their own personal knowledge are true, and those stated upon information and belief they believe to be true.

JOS. W. STERN.

EDWARD B. MARKS.

Subscribed and sworn to before me this 9th day of March, 1900.
[SEAL.]

MAX B. MARKS,
Notary Public, N. Y. Co.

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Filed Apr. 23, 1900.

LIBRARY OF CONGRESS,
COPYRIGHT DEPARTMENT, WASHINGTON, D. C.

I hereby certify that two copies of the musical composition entitled *Whisper Your Mother's Name*, words by Harry Braisted, music by Stanley Carter, were deposited in this office by Jos. W. Stern & Co., of New York, during the week of August 3 to August 8, 1896, and were credited on entry No. 32214 of 1896 to complete copyright.

In witness whereof the seal of the Librarian of Congress has been hereto affixed this fifth day of March, 1900.

HERBERT PUTNAM,
Librarian of Congress,

By THOWALD SOLBERY,
Register of Copyrights.

[SEAL.]

(Stamp.)

Filed Apr. 23, 1900.

LIBRARY OF CONGRESS,
COPYRIGHT DEPARTMENT, WASHINGTON, D. C.

I hereby certify that two copies of the musical composition entitled *Take Back Your Gold*, written & composed by Monroe H. Rosenfeld, were deposited in this office by Jos. W. Stern & Co., of New York, on the twentieth day of February, 1897, and were credited on entry No. 4524 of 1897 to complete copyright.

In witness whereof the seal of the Librarian of Congress has been hereto affixed this fifth day of March, 1900.

HERBERT PUTNAM,
Librarian of Congress,

By THOWALD SOLBERY,
Register of Copyrights.

[SEAL.]

(Stamp.)

Demurrer to Bill of Complaint.

9

Filed Apr. 23, 1900.

In the Supreme Court of the District of Columbia.

JOSEPH W. STERN and EDWARD B. MARKS, Complainants, vs. GEORGE ROSEY, Defendant.	}	In Equity. No. 21365.
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The defendant, by protestation, not confessing or acknowledging all or any of the matters and things in the said bill of complaint contained to be true in manner and form as the same are therein set forth, doth demur thereto, and for causes of demurrer shows that the said complainants have not in and by their said bill stated such a case as doth or ought to entitle them to any such relief as is thereby sought and prayed for in said bill against him.

And defendant further says that said bill doth not state any infringement of the said copyright therein stated or any publication of same by the defendant within the meaning of the copyright laws of the United States.

GEORGE ROSEY.

We, the solicitors for the defendant, certify that in our opinion the above demurrer is well founded in law.

D. W. BAKER,
H. M. EARLE,
Solicitors for Defendant.

STATE OF NEW YORK, }
County of New York, } ss :

10 George Rosey, defendant in the above-entitled cause, deposes and says that the above demurrer is not interposed for delay.

GEORGE ROSEY.

Sworn and subscribed to before me this 19th day of April, A. D. 1900.

[SEAL.]

GEORGE N. BOEHM,
Notary Public, N. Y. Co.

Amended Bill.

Filed May 22, 1900.

In the Supreme Court of the District of Columbia.

JOSEPH W. STERN ET AL., Complainants,	} Equity. No. 21365.
vs.	
GEORGE ROSEY, Defendant.	

To the honorable the justices of the supreme court of the District of Columbia, holding a special term in equity :

The complainants, Joseph W. Stern and Edward B. Marks, amend the bill heretofore filed by them in this cause by inserting an additional paragraph, numbered 5½.

5½. That the said defendant, George Rosey, in manufacturing said records would, after having secured what is known as a master record, to wit, a wax cylinder upon which the aforesaid songs
 11 had been perfectly engraved in manner aforesaid, which perfect or master record would be placed in the device known as the double phonograph and a wax cylinder upon which nothing had been recorded placed directly under the engraved or master record, and by revolving the master record and unengraved cylinder a double sapphire point would reproduce the engraving on the master record upon the wax cylinder revolving below same, and in this manner said defendant has reproduced as many as 5,000 records of your complainants' aforesaid copyrighted musical compositions and songs from one master record, and has sold and is now engaged in vending and selling large quantities of the aforesaid wax cylinders, with the engraving which reproduces the words and music of the aforesaid copyrighted compositions and songs, notwithstanding the demands made upon him by your complainants that he cease from so doing.

DAVID M. NEUBERGER,
 JOHN C. GITTINGS,
Solrs for Compl'ts.

It is ordered that complainants be allowed to amend their bill as prayed, and that the bill stand as amended this 22nd day of May, A. D. 1900, and the demurrer hereto filed to stand as demurrer to amended bill.

JOB BARNARD, *Justice.*

Decree.

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Filed May 22, 1900.

In the Supreme Court of the District of Columbia.

JOSEPH W. STERN ET AL., Complainants,
vs.
GEORGE ROSEY, Defendant. } Equity. No. 21365.

This cause coming on to be heard on the bill and the amended bill and demurrer thereto, after having been fully argued by the solicitors for the respective parties and duly considered by the court, it is, this 22nd day of May, A. D. 1900, by the court adjudged, ordered, and decreed that the demurrer filed by the defendant to the said bill and amended bill of complaint be, and is hereby, sustained; and it is further ordered, adjudged, and decreed that the said bill and amended bill of complaint be, and the same are hereby, dismissed; and it is further ordered, adjudged, and decreed that the complainants pay the costs of the suit.

JOB BARNARD, *Justice.*

From the above decree the complainants in open court pray that they may be allowed an appeal to the Court of Appeals of the District of Columbia, which appeal is by the court allowed upon the plaintiff giving bond in the sum of one hundred dollars.

JOB BARNARD, *Justice.*

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Order for Preparation of Record.

Filed Jun- 8, 1900.

In the Supreme Court of the District of Columbia.

GEORGE W. STERN ET AL. }
vs. } In Equity. No. 21365.
GEORGE ROSEY.

To John R. Young, Esq., clerk :

Please make up record for the Court of Appeals in the above-entitled cause and insert therein the following pleadings :

Bill of complaint and amendment thereto.

Demurrer.

Decree.

JOHN C. GITTINGS,
Solicitor for Complainants.

Memorandum.

June 8, 1900.—Appeal bond filed.

Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA, } ss:
District of Columbia,

I, John R. Young, clerk of the supreme court of the District of Columbia, hereby certify the foregoing pages, numbered from 1 to 13, inclusive, to be a true and correct transcript of the record, as per order of counsel for the appellants herein filed and made part of this transcript, in cause No. 21365, in equity, wherein Joseph W. Stern *et al.* are complainants and George Rosey is defendant, as the same remains upon the files and of record in said court.

In testimony whereof I hereunto subscribe my name and affix the seal of said court, at the city of Washington, in said District, this 20th day of June, A. D. 1900.

JOHN R. YOUNG, *Clerk.*

Court of Appeals of the District of Columbia.

JOSEPH W. STERN and EDWARD B. MARKS, }
 Appellants, } No. 1005, October
vs. } Term, 1900.
 GEORGE ROSEY. }

It is hereby stipulated and agreed by and between counsel for the respective parties that Exhibits C and D (pages 7 and 8 of transcript) may be omitted by the clerk in printing the record, and that copies of same may be handed to the court at the hearing.

JOHN C. GITTINGS,
Att'y for Appellants.

D. W. BAKER,
Attorney for Appellee.

(Endorsed:) No. 1005. Court of Appeals of the District of Columbia. Stipulation as to printing record. Court of Appeals, District of Columbia. Filed Jul-12, 1900. Robert Willett, clerk.

Endorsed on cover: District of Columbia supreme court. No. 1005. Joseph W. Stern and Edward B. Marks, appellants, vs. George Rosey. Court of Appeals, District of Columbia. Filed Jun-27, 1900. Robert Willett, clerk.

COURT OF APPEALS,
DISTRICT OF COLUMBIA,
FILED

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IN THE

CLERK.

Robert Wilby

COURT OF APPEALS

FOR THE

DISTRICT OF COLUMBIA

OCTOBER TERM, 1900.

NO. 1005.

JOSEPH W. STERN AND EDWARD B. MARKS,

Appellants.

VS.

GEORGE ROSEY,

Appellee.

APPELLANTS' BRIEF.

DAVID M. NEUBERGER,

JOHN C. GITTINGS,

Solicitors for Appellants.

IN THE
Court of Appeals, District of Columbia.

OCTOBER TERM, 1900.

No. 1005.

JOSEPH W. STERN AND EDWARD B. MARKS, <i>Appellants,</i>	}
<i>v.</i> GEORGE ROSEY, <i>Appellee.</i>	

BRIEF FOR APPELLANTS.

This is an appeal by Stern and Marks, complainants below, from the final decree passed by the Supreme Court of the District of Columbia, on May 22, 1900, dismissing their bill of complaint.

STATEMENT OF CASE.

A bill of complaint was filed by the appellants, who are co-partners, setting up that they are sole owners and pro-

prietors of the two musical compositions and songs entitled "Take Back Your Gold" and "Whisper Your Mother's Name;" that as the owners of same they fully complied in every respect with Sections 4948 to 4970, both inclusive, of the Revised Statutes of the United States, which is commonly known as the copyright law. The bill further sets out that appellants were engaged in publishing and selling the said musical compositions and songs, and as required by the aforesaid Act of Congress they had printed on front sheet of each piece of music, the dates upon which each had been filed with the Librarian of Congress; copies of each song were made exhibits to the bill. The bill further sets out that the appellee, Rosey, is engaged in the business and trading under the name and style of "The Universal Record Company" and the manufacturing of "records" for the mechanical device called the phonograph; that the appellee, Rosey, having knowledge of appellants' ownership of the said musical compositions and songs and in violation of appellants' rights, placed what are known as wax cylinders in a phonograph which caused the said cylinders to be revolved; that said cylinders while in course of being revolved under a certain metal horn or megaphone in which the musical compositions were played upon some musical instrument and the words of the song sung by the human voice, and the song, being transmitted through the megaphone to what is known as a sapphire recording point having a sharp even surface, which is a part of the phonograph, caused to be engraved on said wax cylinders a record of the music and words of appellants' musical compositions and songs.

The amendment to complainants' bill states that after obtaining in this way what is termed "a master or perfect record," the appellee Rosey would place "the master record" in what is known as a "double phonograph" and immediately below "the master record" would place a wax cylinder

upon which nothing had been recorded; the phonograph would cause both the wax cylinder and the master record to be revolved one below the other; that a double sapphire recording point placed between the two, the master record and the wax cylinder, would cause to be reproduced upon the wax cylinder the engraving of appellants' musical composition and song upon the master record; that said wax cylinder would then be a complete record of the words of the song and the music as played. That in this way the appellee has produced as many as 5,000 records from one "master record." The bill further sets up that the appellee, Rosey, is vending and selling large numbers of these wax cylinders containing records of the words and music of appellants' songs and musical compositions, and that your appellants are entitled to an accounting for the profits derived from said publication, which profits they are informed and believe amount to the sum of \$10,000, appellants' bill waiving all rights to the penalties and forfeitures which they may be entitled to under the Statutes of the United States in such cases, made and provided; bill praying for an injunction, discovery and accounting.

To said bill the appellee demurred. The case came on for a hearing on bill and demurrer; demurrer was sustained and bill dismissed, whereupon appellants noted an appeal.

ASSIGNMENT OF ERRORS.

First. The court erred in sustaining demurrer.

Second. The court erred in dismissing the bill of complaint.

ARGUMENT.

In argument in the court below, it was contended by the appellee, that "copyright" or the property which an author or composer has in his creations, is derived solely from the

several Acts of Congress; that an author or composer's common-law right of property in his creations had never been recognized in this country. In considering this case, the court below was evidently of the opinion that the right was solely a statutory right and in ascertaining whether or not appellants' rights had been infringed, it was only necessary to examine the several Acts of Congress to ascertain whether or not this mode of multiplying copies as set up in the bill, was within the terms of the Acts. This we contend is wrong.

Unquestionably an author or composer's common-law right in his mental creations prior to publication, is in force in this country, and we respectfully submit that if the common law is in force in this country at the present day, it must have been in force prior to any statute passed by Congress. If the common law was in force prior to the original act of 1790, which the following authorities seem to conclusively settle—

Wheaton vs. Peters, 8 Peters, p. 656,

Parton vs. Prong, 3 Clifford, p. 549—

before we can properly construe the Act of 1790, it would become necessary to ascertain just what an author or musical composer's right to his mental creations were at the time this Act was passed. We need only cite the following authorities, which are the leading cases upon this question, to satisfy the mind of anyone learned in the law that, up to the English Statute of 8th of Anne, at common law an author or musical composer had the sole and exclusive right to multiply copies and dispose of same after publication, in perpetuity.

Miller vs. Taylor, 4 Borroughs' Rep., 2340.

Donaldson vs. Becket, 4 Borroughs, 2894.

In this case the House of Lords set the question at rest as to whether or not at common law an author or composer

had the perpetual right after publication, to multiply copies of his books or musical compositions. The vote upon that question, by the House of Lords, being seven to four in the affirmative, Lord Mansfield not voting, but from all the reports of the case, and from what Mr. Doan says in his book upon copyrights, Lord Mansfield, unquestionably, if he had voted, would have voted with the majority, so can there be any dispute at the present day as to what the common law of England was relative to this right?

The contention, of course, will be made by the appellee, that this is no longer a mooted question in this country, as in the case of *Wheaton vs. Peters*, 8 Peters, page 657, the Supreme Court of the United States has decided it; that court holding there was no common-law right so far as there being a right after publication, and the sole right that the author or composer had in his composition after publication was derived from the Act of 1790, which was passed in accordance with the right vested in Congress by paragraph 8, of Article I, of the Constitution. We respectfully submit that, notwithstanding this decision, *the right did exist at common law*. Every ground upon which the court, in its opinion, claimed to have decided this momentous question, has been shown to be fallacy. *Doan on Copyright*, p. 22.

Mr. Justice McLane, in his opinion, goes upon the theory that the common-law could not have been in force in this country except in so far as it had been adopted by the several States, and that the common law was never in force so far as the property in copyrights was concerned, in the State of Pennsylvania, basing this opinion upon the fact that there was no adjudicated case in England where this common-law right was claimed until subsequent to the Act of 8 of Anne, and the common law, in so far as the State of Pennsylvania was concerned, must have been the common law of England prior to 1668, the date of the charter to William Penn. *Wheaton vs. Peters*, 8 Peters, p. 357.

Be this ~~that~~ ^{as} it may, certainly if a decision by the House of Lords of England in 1774, found this property right in authors and composers at common-law, that decision would be binding upon any Court in the United States as to what the common-law of England was. *Donaldson vs. Beckett*, 4 Burrows, p. 2804. There is no contention made in *Wheaton vs. Peters*, that the common-law if in force in this country, had been taken away or affected by the Act of 8 of Anne, as said act unquestionably had no binding force upon the colonies and it has never been so contended; so if the decision of the Supreme Court of the United States in the case of *Wheaton vs. Peters*, was grounded upon the fact that the common law was not in force in this country, and this common-law right could not have existed in Pennsylvania, owing to the fact that Pennsylvania became a colony in 1668 and the right was not found to exist at common law until 1769, therefore it could not have been part of the common law brought over by William Penn; and if the Supreme Court of Pennsylvania has repeatedly decided that the common law did exist in Pennsylvania in all its branches, and was the foundation of all the laws of that State since the decision in *Wheaton vs. Peters*, then the decision of the Supreme Court of the United States based upon grounds which has subsequently been swept away, certainly can have no binding force upon the questions involved.

Our purpose in asserting that the common-law right existed; and taking up the time of the court in reference thereto, is that we contend that the statute of 1790 is cumulative in its remedy and is not a statute creating a property right, and if such contention is correct, the construction placed upon that statute as to whether or not the act protects appellants from an infringement such as is set forth in the bill of complaint, could only be properly construed by taking into consideration that such a right existed at common law. In other words, the right at common law ex-

isted after as well as before publication, and the Acts of Congress only restrict the right to a time limited, and compel all who desire to hereafter assert the right of property after publication, to comply with the act prior to publication.

And we respectfully submit any act which would be an injury or an infringement at common law is an infringement of this property right at the present time.

This right of property is in the incorporeal mental creation; the arrangement of combination of sounds which produce harmony; the arrangement of language or words in combination with each other, so when sung, spoken or written, they convey the author's or composer's thoughts; it is of very little difference whether the author places his thoughts upon paper or not.

In reciting the song or playing the composition before publication, and anyone hearing them should make a copy in the manner the appellee, Rosey, has done, would this not be an infringement of the author or composer's rights? Unquestionably it would. Then if the right of property is in the words and music, and the terms of the copyright act has been complied with, why is it not an infringement of this right after publication? Whether or not the common-law right now exists, the contention that these records are not copies as they are not printed words and musical characters, is certainly mere sophistry.

Section 4965 of the Supplement to the Revised Statutes, reads as follows:

"If any person, after recording the title of any map, chart, dramatical or musical composition, print, cut, engraving or photograph, or chromo, or of the description of any painting, drawing, statue, statuary, model or design intended to be perfected and executed as a work of the fine arts, as provided by this act, shall within the term limited, contrary to the provisions of

this act, and without the consent of the proprietor of the copyright first obtained in writing, signed in the presence of two or more witnesses, *engrave, etch, work, copy, print, publish, dramatize, translate or import*, either in whole or in part, or by varying the main design with intent to evade the law, or, knowing the same to be so printed, published, dramatized, translated or imported, *shall sell or expose for sale any copy of such map or other article as aforesaid*, he shall forfeit to the proprietor all the plates on which the same shall be copied and every sheet thereof," etc.,

For sake of argument, admit that the only right appellants have is derived from statute, we contend the language of the several acts is broad and comprehensive enough to show that the clear intention of Congress was to protect after publication, authors and composers for a time limited, in their *brain creations* against infringement: that is to say, to give them the same rights that had been contended they possessed at common law, but to limit the time in which they were to enjoy the benefit thereof.

This being so, and the appellants having brought themselves within the benefit of the "copyright" acts, anything which would infringe upon the right to exclusively multiply copies and sell and dispose of the words and music of their songs would be an injury.

The mode of copying is immaterial, as owner is certainly protected against any reproduction without regard to how it is effected. 7 *Ency. of Law*, 580, 2nd Edition.

The word *copy* is defined by Samuel Johnson as "to derive it from"; "after his manner".

They are not less records of music and song because the words and music are recorded by means of indentation or engraving upon the wax cylinder, which cannot be read by

the eye; but only conveyed to the ear when placed in the phonograph.

Copyright is defined as "the sole and exclusive liberty of printing and *otherwise multiplying copies*." Thus copies multiplied by lithographing, *Novello vs. Ludlow* (1852), 12 C. B., 177; by shorthand, *Nichols vs. Pitman* (1884), 26 Ch. D., 374, infringe. The symbols matter little in themselves, the question in each case is, whether the defendants are multiplying copies. It is contended by appellee that these records are intended as a part of a machine as in *Kennedy vs. Tammenev*, 33 Fed. Rep. p. 584. In answer, we respectfully submit that the "record" is no part of the machine, as the machine is complete when it has the wax cylinder, but when appellee makes a record of the copyrighted song and music on the wax cylinder, which "records" are sold, it becomes an infringement. In *Kennedy vs. McTammany*, there was a mechanical contrivance which, when placed in a musical instrument, would, by reason of the inventor's skill, operate mechanically and strike certain notes or keys of the musical instrument, and in that manner have the musical instrument play a musical composition.

One of the purposes of depositing copies of mental creations is to place on file just what we claim to have originated and what we claim to be our property. The contention that the law protects you in your ownership of your creation, but limits you in the manner and form in which you shall vend it for gain; it is yours but you can only sell it in certain forms, and the *Public* that engage in the sale of your property for gain, and to your detriment, so long as they do not do it in the exact manner in which the statute provides, you are not injured. Such reasoning, we respectfully submit, is a burlesque which might be entertaining if it were confined to theory, but reduced to practice it becomes grievous.

It will possibly be argued that when the owner of a copy-

righted song publishes and sells copies, anyone purchasing a copy of the song has the right to sing it as often as he chooses, and make his living by means of singing the song, and that the sale of cylinders by appellee containing the voice of the party singing the song, who has obtained the right by purchasing a copy, certainly has the right to sing it in a "phonograph" and sell copies of cylinders with the song upon them as sung by him. We respectfully submit that the "record" of the song is what is sold, and not the voice, whether or not there is a right of property in the voice it is not necessary to argue, but there is a *right of property in the song and music* which appellants' own, and when their property is used to enhance the value of others in other ways, than appellee has the legitimate right to do, he injures their rights.

It may be said in this way appellee advertises the songs which is a benefit to the appellants. How can this be so, as he only uses songs which have been made popular at great expense by appellant, in paying orchestras to play the music and artists to sing the songs, for the sole purpose of making the song popular and thereby increasing their sale.

It is respectfully submitted that the sale of the records of the music and song for the phonograph, is a business that appellants could engage in, and could purchase the wax cylinders and make the records of their songs, but the appellee, *has not this right.*

The word "published" is defined by Samuel Johnson to be "to make generally known;" "to proclaim;" "to divulge."

Is the word "publish" legally defined to mean anything different when applied to copyright before publishing, as relating to what, under the law, has been held to amount to a "publication," than when applied in the statute as reserving the sole right "to copy, publish, duplicate," etc?

We most respectfully submit that it does not. If an author or composer should read, sing or play his composition and multiply records of the composition for the phonograph and sell the records, as the appellee is here charged with doing prior to complying with the act of Congress, would that amount to a "publication," and the author thereby loses all rights to his creation? We think he would. Then if this sale of records is "publication" why does not the appellee infringe when he multiplies copies in the above manner and sell some? It will probably be contended that the "records" for use in the phonograph, do not occupy the same field as sheet music and printed songs. We submit it is not material whether they do or not, but as a fact they do. For instance, take a comic song, the "record" when placed in a phonograph gives not only the benefit of the words of the song, *but the expression and even the phrasing can be taught*: and the music note for note which any musician can distinguish: further, the *emphasis*. Probably one distinguishing feature being a blind man can be taught the music and words from the use of one of the "records," as they appeal to the ear, and certainly the value in this kind of property is in its charm to the senses when hearing the song and music, and not reading the words and musical characters. Children and the uneducated with an ear for music, can get the benefit of learning a song from one of these records.

In conclusion, we state that, to ascertain whether or not the appellants' rights are infringed by the acts as set forth in the bill of complaint, it is essential that the court should have considered that there was a common-law right when construing the language of the statute, and if this is done it would be impossible to have held that the appellee had not infringed. And further, if the court believed that there was no such right known at common-law as an author or composer's right after publication, nevertheless, in the interpreting of the Act, and to get at the intention of Con-

gress, the court should have considered the contentions which had been made from time to time, that this right did exist at common law, so as to ascertain whether or not the intention of Congress was not to pass an act broad and comprehensive enough to give authors or composers after publication, the rights which they contended at common-law they had. However, we respectfully submit that, even if the Act should be so interpreted as an act creating a right which did not heretofore exist in any form, either before or after publication, the language of the several Acts amendatory thereto, is sufficient to protect the author or composer from a multiplication of his compositions in the manner and mode that the appellee is charged with having done, and respectfully submit that the court below should have overruled the the demurrer with leave to the defendant to answer.

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